

A Takong Tabari v Government of Sarawak & Ors

HIGH COURT (MIRI) — SUIT NOS MR 5 OF 1993 AND MR 60 OF 1992
RICHARD MALANJUM J
17 OCTOBER 1995

B *Tort — Negligence — Explosion and fire — Duty of care of government when providing gas supply — Duty of care of bank to ensure safety of customers in its premises — Whether duty breached*

Tort — Occupier's liability — Duty to invitee — Explosion causing injury — Escape of gas from corroded gas pipe — No action by occupier of premises when unfamiliar smell was detected — Whether occupier took sufficient steps to prevent injury to invitee

C *Tort — Public nuisance — Escape of gas causing explosion — Whether there was duty to ensure that gas would not escape — Whether public was affected generally — Whether plaintiff suffered special damage*

D *Damages (Personal Injury or Death) — Fatal accident — Claim for damages for negligently causing injury and death — Loss of dependency and bereavement — Pain and suffering — Civil Law Act 1956 ss 7 & 8*

Damages (Personal Injury or Death) — Personal injuries — Burns — Second and third degree burns — Loss of earnings — Plaintiff a self-employed consulting engineer — Correct approach in assessing loss of earnings

F Two actions were jointly tried in this case. The first action was brought by the administratrix of the estate of a deceased person ('the deceased') while the second action was brought by the plaintiff in respect of personal injuries caused to himself. At the material time, the deceased (first action) and the plaintiff (second action) were making banking transactions in the premises of Public Bank, the fourth defendant in the first action and the third defendant in the second action ('Public Bank'), when an explosion and fire occurred. The explosion was due to a gas leak from a corroded gas pipe in the premises occupied by Public Bank. The evidence established that: (i) the premises occupied by Public Bank were two shop lots, nos 292 and 293 which were respectively registered in the names of Liew Yit Tze, the second defendant in the first action and the first defendant in the second action ('Liew'), and Phua Su Meng, the third defendant in the first action and the second defendants in the second action ('Phua'); (ii) Public Bank had engaged a consultant, Perunding Dayacipta, the first third party ('Perunding'), to handle the renovation works in the premises. Gas supply was not included in the renovation plans and it was not a subject to be considered before a certificate of fitness could be issued; (iii) there was a supply of gas to shop lot no 292. However Liew had applied for the supply to be disconnected with effect from 1 November 1986; (iv) in shop lot no 293, there was never any supply of gas and it was not in the list of accredited gas consumers; (v) the supply of gas in Miri at all material times was

under the care and management of the Government of Sarawak, the first defendant in the first action and the third third party in the second action ('the Government'), through the Public Works Department ('the PWD'); (vi) in 1988, the PWD carried out a gas metering exercise in Miri and shop lot no 293 was connected to the metering system although it was not in the list of accredited gas consumers; and (vii) the 1 January 1990 and 5 February 1990 readings of the gas meter for shop lot no 293 indicated high usage of gas. At the time of the accident, the deceased was 37 years old and a senior foreman with Shell Sarawak Bhd. The plaintiff in the second action was an engineer and suffered 36%–37% second and third degree burns and multi-lacerations on his body. Due to his injuries, he underwent operations for skin grafts. The plaintiff in the first action founded her case on negligence and occupier's liability while the plaintiff in the second action proceeded on the basis of negligence, escape of gas being a dangerous thing and public nuisance.

Held, allowing the claims:

- (1) On a balance of probabilities, the explosion and fire on 16 February 1990 was due to the ignition of an inflammable mixture of gas and air in the premises. Gas was present in the premises having leaked from the natural gas supply supplied by the Government through the PWD (see p 446A–C).
- (2) Gas supply was not included in the renovation work carried out by Perunding. There was no evidence that the contractors meddled with the gas pipes in the premises. Perunding was thus not liable (see p 454A–C).
- (3) Shop lot no 293 was not on the list of accredited gas consumers and Phua never applied for the supply of gas. As regards shop lot no 292, an application had been made on 1 November 1996 to disconnect the supply of gas. Liew was also under no obligation to ensure the safety of the supply of gas to shop lot no 292 under his agreement with Public Bank. Thus there was no liability on the part of Liew and Phua (see p 452F–G).
- (4) The PWD was duty-bound to ensure that only those in the list of accredited gas consumers or those who had applied for supply of gas were supplied with gas. In this case there was no or insufficient precaution taken by PWD to ensure that only accredited gas consumers were connected to the supply of gas. The PWD also did not carry out any investigations into the high readings on the meter for shop lot 293. There was therefore an obvious breach of duty on the part of the PWD (see p 450C).
- (5) On a balance of probabilities, there were no or insufficient steps taken by the PWD and thus the Government, to ensure safety after the supply of gas was connected to the premises. The PWD and thus the Government had a major role in permitting the accident through its acts and omissions (see p 451A–B).

- A (6) Public Bank owed a duty and should have taken all reasonable precautions to ensure the safety its customers while in the premises. It was obvious from the evidence that none of the employees of Public Bank, including the branch manager, did anything after becoming aware of some unfamiliar smell in the premises, although the smell should have prompted them to investigate. There was no evidence adduced to explain the inaction of the employees. Thus the omission on the part of Public Bank, through its staff, to a certain degree led to the happening of the accident. To that extent, some blame should be attributed to Public Bank (see p 457D–H).
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- C (7) Based on the fact that gas is a dangerous article, the Government and Public Bank owed a duty of care to those in the position or class of the deceased at the material time (see p 455E); *Dominion Natural Gas Co v Collins* [1908–10] All ER Rep 61 followed. A breach of that duty, through acts and omissions that led to the explosion and fire in the premises, caused injury and death. The plaintiff in the first action thus succeeded to establish negligence on the part of the Government and Public Bank. Similarly, the plaintiff in the second action was able to prove negligence on the part of Public Bank (see p 455G–I).
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- E (8) As the occupier, Public Bank owed a duty to the deceased, an invitee, to prevent damage or injury to the invitee due to unusual dangers on the premises which it knew or ought to know and which the invitee did not know. Since Public Bank, through its staff, did not take any reasonable or reasonably sufficient measures to meet its duty as the occupier towards the deceased, the plaintiff therefore had established, on a balance of probabilities, the liability of Public Bank as the occupier of the premises (see p 456E–I); *Indermaur v Dames* (1886) LR 1 CP 274 followed.
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- G (9) In respect of the second action, the plaintiff failed to make Public Bank liable for the escape of the gas. There was no basis to say that Public Bank collected and kept the gas in the premises. It could also not be said that Public Bank, while it knew or ought to have known about the gas, acted or omitted to act, thereby allowing the escape of the gas. The plaintiff's cause of action in public nuisance also failed as the allegations made had not been proven. Firstly, Public Bank could not be expected to ensure that gas in dangerous quantities would not escape and cause a public nuisance when there was no request for the supply of the gas in the first place. Secondly, there was no evidence adduced that the public was affected generally and that the plaintiff suffered special damage arising therefrom (see pp 458E–459C); *Sedleigh-Denfield v O'Callaghan & Ors* [1940] 3 All ER 349 followed.
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- I (10) In the first action, the degree of liability between the Government and Public Bank should be in the ratio of 90:10

- and the same ratio should apply in respect of quantum of damages (see p 456D); *Kathavarayan v Ng Sup Moi & Anor* [1987] 1 MLJ 246 followed. In the second action, Public Bank would have to meet the payment of the full quantum of damages awarded and costs. It would however be entitled to seek contribution from the Government as it had proved its third party claim against the Government (see p 461D-H); *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 followed. A
- (11) In the first action the total general damages for loss of dependency would be RM180,000. Damages for bereavement in the sum of RM10,000 would be payable to the wife of the deceased pursuant to s 7(3A) of the Civil Law Act 1956 ('the Act'). Funeral expenses of RM3,000 would also be allowed (see p 456A-C). B
- (12) As the deceased in the present case died about ten and a half hours after the accident, it was a short period prior to death and hence the claim for RM10,000 by the estate could not be supported. A sum of RM3,000 for pain and suffering should be adequate (see p 464H-I). C
- (13) In the second action, the appropriate approach to adopt in assessing loss of earnings should be to consider the trend of the earnings of the plaintiff from 1989 onwards. After taking into account tax deduction, a fair figure for the loss of earnings during the medical leave of the plaintiff, inclusive of the period he was medically advised to do light work, should be in the sum of RM20,000 (see p 466I-467A). D
- (14) Considering that the plaintiff in the second action suffered 36%-37% second and third degree burns, the fair sum for general damages should be RM50,000 (see p 467D). E

[Bahasa Malaysia summary]

Dalam kes ini dua tindakan telah dibicarakan bersesama. Tindakan yang pertama telah dibawa oleh pentadbir harta pusaka seorang yang telah meninggal ('simati') sementara tindakan yang kedua telah dibawa oleh plaintif berkenaan dengan kecederaan diri yang telah dialaminya sendiri. Pada masa yang berkenaan, simati (tindakan pertama) dan plaintif (tindakan kedua) sedang membuat urusan perbankan di bangunan Public Bank, defendan keempat dalam tindakan pertama dan defendan ketiga dalam tindakan kedua ('Public Bank'), apabila suatu letupan dan kebakaran telah berlaku. Letupan tersebut adalah disebabkan oleh kebocoran gas dari paip gas yang terkakis dalam bangunan yang diduduki oleh Public Bank. Keterangan telah menunjukkan bahawa: (i) bangunan yang diduduki oleh Public Bank adalah dua lot kedai, no 292 dan 293 yang masing-masing didaftarkan atas nama-nama Liew Yit Tze, defendan kedua dalam tindakan pertama dan defendan pertama dalam tindakan kedua ('Liew'), dan Phua Su Meng, defendan ketiga dalam tindakan pertama dan defendan F

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- A kedua dalam tindakan kedua ('Phua'); (ii) Public Bank telah mengupahkan satu firma perunding, iaitu Perunding Dayacipta, pihak ketiga yang pertama ('Perunding'), untuk mengendalikan kerja-kerja pengubahsuaian di bangunan tersebut. Bekalan gas telah tidak termasuk dalam pelan pengubahsuaian dan iannya bukanlah suatu perkara yang perlu dipertimbangkan sebelum perakuan kesesuaian dapat diisukan; (iii) terdapat bekalan gas ke lot kedai no 292. Walau bagaimanapun, Liew telah memohon supaya bekalan gas tersebut dipotong mulai daripada 1 November 1986; (iv) di lot kedai no 293, tidak pernah ada bekalan gas dan ianya tidak disenaraikan dalam senarai pengguna gas yang rasmi; (v) bekalan gas di Miri adalah pada setiap masa di bawah pengurusan dan jagaan Kerajaan Negeri Sarawak, defendan pertama dalam tindakan pertama dan pihak ketiga yang ketiga dalam tindakan kedua ('Kerajaan'), menerusi Jabatan Kerja Raya ('JKR'); (vi) dalam tahun 1988, JKR telah menjalankan gerak kerja pemeteran gas di Miri dan lot kedai no 293 telah disambungkan kepada sistem pemeteran walaupun ianya bukan di dalam senarai pengguna gas yang rasmi; dan (vii) bacaan meter gas untuk lot kedai no 293 pada 1 Januari 1990 dan 5 Februari 1990 menunjukkan bahawa penggunaan gas adalah tinggi. Semasa kejadian tersebut, simati berumur 37 tahun dan merupakan mandur kanan dengan Shell Sarawak Bhd. Plaintiff dalam tindakan kedua merupakan seorang jurutera dan telah mengalami 36%–37% keselaran tahap kedua dan ketiga dan pelbagai kelecetan atas badannya. Oleh sebab kecederaannya, dia telah menjalani pembedahan untuk graf kulit. Plaintiff dalam tindakan pertama mengasaskan kesnya atas kecuaiian dan tanggungan penduduk sementara plaintiff dalam tindakan kedua bertindak atas asas kecuaiian, pelepasan gas yang merupakan satu bahan merbahaya dan kekacauan awam.
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Diputuskan, membenarkan tuntutan-tuntutan itu:

- (1) Atas imbangan kebarangkalian, letupan dan kebakaran pada 16 Februari 1990 itu telah diiakibatkan oleh satu campuran gas dan udara mudah terbakar yang terdapat di dalam bangunan itu. Gas wujud di dalam bangunan itu setelah kebocoran berlaku dalam bekalan gas asli yang dibekalkan oleh Kerajaan melalui JKR (lihat ms 446A–C).
- (2) Bekalan gas adalah tidak termasuk dalam kerja pengubahsuaian yang dijalankan oleh Perunding. Tidak ada keterangan bahawa kontraktor telah mengusik paip-paip gas di bangunan tersebut. Maka Perunding adalah tidak bertanggung (lihat ms 454A–C).
- (3) Lot kedai 293 tidak termasuk dalam senarai pengguna gas yang rasmi dan Phua tidak pernah memohon untuk gas. Berkenaan dengan lot kedai no 292, suatu permohonan telah dibuat pada 1 November untuk memotong bekalan gas tersebut. Liew juga tidak mempunyai tanggungjawab untuk memastikan keselamatan sambungan bekalan gas ke lot kedai no 292 di
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- bawah perjanjiannya dengan Public Bank. Maka tidak ada tanggungan di pihak Liew dan Phua (lihat ms 452F–G). A
- (4) JKR mempunyai tugas untuk memastikan bahawa hanya mereka atas senarai rasmi pengguna gas ataupun mereka yang telah memohon untuk bekalan gas sahaja yang akan dibekalkan dengan gas. Dalam kes ini, langkah-langkah yang diambil oleh JKR dan demikian, Kerajaan, untuk memastikan bahawa mereka yang merupakan pengguna gas rasmi sahaja yang disambungkan kepada bekalan gas adalah tidak memadai ataupun tiada langsung. JKR juga telah tidak melakukan sebarang penyiasatan mengenai bacaan meter yang tinggi berkenaan dengan penggunaan gas yang tinggi untuk lot kedai 293. Maka jelas terdapatnya keingkaran tugas untuk berhati-hati di pihak JKR (lihat ms 450C). B C
- (5) Atas imbalan kebarangkalian langkah-langkah yang diambil oleh JKR dan demikian Kerajaan, untuk memastikan keselamatan sambungan bekalan gas ke bangunan tersebut adalah tiada langsung ataupun tidak memadai. Maka JKR dan demikian Kerajaan, melalui tindakan dan kegagalan, telah memainkan peranan yang utama dalam mengakibatkan letupan dan kebakaran dalam bangunan tersebut (lihat ms 451A–B). D
- (6) Public Bank mempunyai tugas untuk mengambil langkah-langkah pencegahan yang munasabah untuk memastikan keselamatan pelanggannya semasa dalam bangunan. Adalah jelas dari keterangan bahawa tiada siapa dari pekerja-pekerja bank, termasuk pengurus cawangannya sekali, yang telah melakukan sebarang tindakan setelah mereka telah sedar akan bau yang luar biasa dalam bangunan tersebut, walaupun bau tersebut patut menyebabkan mereka menyiasat. Tidak ada sebarang keterangan untuk menjelaskan sebab mengapa pekerja-pekerja tidak bertindak. Maka, kegagalan di pihak Public Bank, melalui pekerja-pekerja mereka, sehingga takat yang tertentu telah mengakibatkan kemalangan tersebut. Sehingga takat tersebut, liabiliti harus ditanggung oleh Public Bank (lihat ms 457D–H). E F G
- (7) Berdasarkan fakta bahawa gas merupakan sesuatu yang berbahaya, Kerajaan dan Public Bank mempunyai tugas berhati-hati terhadap mereka yang berada dalam kedudukan atau kelas simati pada masa itu (lihat ms 455E); *Dominion Natural Gas Co v Collins* [1908–10] All ER Rep 61 diikuti. Adalah disebabkan pecahan tugas tersebut, melalui tindakan dan kegagalan yang telah menyebabkan letupan dan kebakaran di bangunan tersebut, yang telah mengakibatkan kecederaan dan kematian. Maka plaintif dalam tindakan pertama telah berjaya membuktikan kecuaiannya di pihak Kerajaan dan Public Bank. Begitu juga plaintif dalam tindakan kedua telah dapat membuktikan kecuaiannya di pihak Public Bank (lihat ms 455G–I). H I

- A (8) Sebagai penduduk, Public Bank mempunyai tugas terhadap si mati yang merupakan seseorang yang dijemput, untuk mengelakkan kecederaan ataupun kerugian kepada orang yang dijemput berdasarkan bahaya yang tidak biasa di bangunan tersebut yang diketahui olehnya ataupun yang patut diketahuinya yang mana tidak diketahui oleh orang yang dijemput. Oleh kerana Public Bank, melalui pekerjaanya telah tidak mengambil langkah-langkah yang memadai untuk memenuhi kewajipan tugasnya sebagai penduduk terhadap si mati, maka plaintif telah membuktikan, atas imbalan barangkalian, akan liabiliti Public Bank sebagai penduduk bangunan tersebut (lihat ms 456E-I); *Indermaur v Dames* (1886) LR 1 CP 274 diikuti.
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- C (9) Berkenaan dengan tindakan kedua, plaintif telah gagal membuktikan liabiliti Public Bank untuk pelepasan gas tersebut. Tidak ada dasar untuk menyatakan bahawa Public Bank telah mengumpulkan dan menyimpan gas dalam bangunan. Juga tidak boleh dikatakan bahawa Public Bank, sementara ianya telah mengetahui ataupun patut mengetahui mengenai gas tersebut, telah bertindak ataupun gagal bertindak, maka membenarkan gas tersebut dilepaskan. Kausa tindakan plaintif atas kacau-ganggu awam juga telah gagal kerana dakwaan tidak dibuktikan. Pertamanya, tidak dapat diharapkan supaya Public Bank akan memastikan supaya gas dalam kuantiti yang merbahaya tidak akan dilepaskan dan menyebabkan kacau ganggu awam bila pada mulanya lagi, tidak ada permintaan untuk bekalan gas. Keduanya, tidak ada keterangan yang dikemukakan untuk menunjukkan bahawa ada kesan atas orang ramai secara amnya dan bahawa plaintif telah mengalami kerugian khas yang timbul akibat darinya (lihat ms 458E-459C); *Sedleigh-Denfield v O'Callagan & Ors* [1940] 3 All ER 349 diikuti.
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- G (10) Dalam tindakan pertama, tahap liabiliti di antara Kerajaan dan Public Bank sepatutnya dalam pecahan 90:10 dan pecahan yang sama patut terpakai berkenaan dengan kuantum (lihat ms 465D); *Kathavarayan v Ng Sup Moi & Anor* [1987] 1 MLJ 246 diikuti. Dalam tindakan kedua, Public Bank terpaksa membuat bayaran ganti rugi yang penuh akan kuantum yang diberikan serta kosnya. Walaubagaimanapun ianya berhak mendapatkan sumbangan dari Kerajaan kerana ianya telah membuktikan tuntutan pihak ketiga terhadap Kerajaan (lihat ms 461D-H); *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 diikuti.
- H
- I (11) Dalam tindakan pertama jumlah ganti rugi am untuk kehilangan tanggungan adalah RM180,000. Ganti rugi untuk kehilangan adalah RM10,000 yang dibayar kepada isteri simati menurut s 7(3A) Akta Undang-undang Sivill 1956 ('Akta tersebut'). Perbelanjaan sejumlah RM3,000 untuk pengkebumian juga dibenarkan (lihat ms 465A-C).

- (12) Oleh kerana si mati dalam kes ini telah meninggal dunia sepuluh setengah jam setelah kemalangan tersebut, ianya adalah tempoh masa yang pendek sebelum kematiannya, maka tuntutan untuk RM10,000 tidak dapat disokong. Jumlah RM3,000 untuk kesakitan dan penderitaan patut mencukupi (lihat ms 464H-I). A
- (13) Dalam tindakan kedua, pendekatan yang wajar untuk mentafsirkan kehilangan pendapatan adalah untuk mengambilkira corak pendapatan plaintif mulai dari 1989. Setelah mengambilkira potongan cukai, jumlah kehilangan pendapatan semasa cuti sakit plaintif termasuk tempoh masa semasa dia dinasihatkan menjalani kerja ringan, haruslah dalam lingkungan jumlah RM20,000 (lihat ms 466I-467A). B C
- (14) Memandangkan bahawa plaintif dalam tindakan kedua telah mengalami keselaran tahap dua dan ketiga sebanyak 36%-37%, maka jumlah yang wajar untuk ganti rugi am patutlah RM50,000 (lihat ms 467D)]. D

Notes

For cases on negligence, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 477-480.

For a case on public nuisance, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 875. E

For cases on occupiers' liability, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 888-902.

For cases on fatal accidents, see 6 *Mallal's Digest* (4th Ed) paras 270-316.

For a case on personal injuries, see 6 *Mallal's Digest* (4th Ed) para 369. F

Cases referred to

Bennet v Tugwell [1971] 2 WLR 847

Bowater v Rowley Regis Corp [1944] KB 476

British Transport Commission v Gourley [1956] AC 185 G

Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722

Dingle v Associated Newspapers Ltd [1961] 2 QB 162

Dominion Natural Gas Co v Collins [1908-10] All ER Rep 61

Donoghue v Stevenson [1932] AC 562

Drinkwater v Kimber [1952] 2 QB 281 H

Imperial Chemical Industries Ltd v Shatwell [1965] AC 656

Inderrmaur v Dames (1886) LR 1 CP 274

Kathavarayan v Ng Sup Moi & Anor [1987] 1 MLJ 246

Lau Tin Sye v Yusuf bin Muhammad [1973] 2 MLJ 186

Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors [1983] 2 MLJ 51 I

Letang v Ottawa Electric Railway Co [1926] AC 725

London Graving Dock Co Ltd v Horton [1951] AC 737

Mariah bte Mohamed v Abdullah bin Daud [1990] 1 MLJ 240

Nani v WG Williams [1986] 2 MLJ 68

Nippon Yusen Kaisha v WA Balch [1954] MLJ 53

- A *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324
Pang Ah Chee v Chong Kwee Sang [1985] 1 MLJ 153
Page v Smith [1995] 2 All ER 736
Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor
 [1988] 1 MLJ 19
- B *Sedleigh-Denfield v O'Callagan & Ors* [1940] 3 All ER 349
Slater v Clay Cross Co Ltd [1956] 2 QB 264
Teh Hwa Seong v Chop Lim Chin Moh & Anor [1981] 2 MLJ 341
Yee Hup Transport & Co v Wong Kong [1967] 2 MLJ 93

C **Legislation referred to**

Civit Law Act 1956 ss 7, 8

Suit No MR 5 of 1993

- D *MS Sandhu (MS Sandhu & Co)* for the plaintiff.
Bernard Philip (Legal Officer) for the first defendant.
Lili Puk (DF Abang Zen) for the second defendant.
David Lim (Wan Ullok, Jugah Chin & Co) for the fourth defendant.

Suit No MR 60 of 1992

- E *Chin Yung Yett (Yong Wong & Chin)* for the plaintiff.
Lili Puk (DF Abang Zen) for the first defendant.
David Lim (Wan Ullok, Jugah, Chin & Co) for the third defendant.
Richard Poh (Poh & Co) for the first third party
Bernard Philip (Legal Officer) for the second and third third parties.

- F *Cur Adv Vult*

Richard Malanjum J:

INTRODUCTION

- G There are two actions before me, namely Suit Nos MR5 of 1993 ('the first action') and MR60 of 1992 ('the second action'). At the commencement of the hearing of the second action, learned counsel for the plaintiff in that action applied to have the first action jointly tried. Learned counsel for the defendants and third parties in the second action raised no objections to the application. After having considered the matter, in particular, the facts
- H that both actions related to the same incident and that there could be common parties and witnesses, I therefore ordered that the two actions be jointly tried.

THE ACTIONS

- I In the first action, the plaintiff is the administratrix of the estate of Jeffery Satuk Gabar ('the deceased'). In her claim, the plaintiff prays for the following reliefs:

- (1) Damages under s 7 of the Civil Law Act 1956 ('the Act') for the benefit of the dependants of the deceased;

- (2) Damages under s 8 of the Act for the benefit of the estate of the said deceased; A
- (3) Interest on the said damages at such rate and for such period as the court shall think just;
- (4) Such further or other relief as the court may deem fit; and
- (5) Costs. B

These reliefs are sought arising from the averments of the plaintiff on the escape of gas being a dangerous thing, negligence, occupier's breach of duty of care and public nuisance.

In the second action, the plaintiff is suing in his own capacity and he prays for the following: C

- (1) Special damages as aforesaid (RM244,206.72);
- (2) Damages;
- (3) Further and other relief; and D
- (4) Costs.

Similarly, in the second action, the plaintiff alleges liability on the basis of the escape of gas being a dangerous thing, negligence and public nuisance.

For the first action, only the first, second and fourth defendants are involved as judgment had been entered against the third defendant. E

In respect of the second action, the second defendant was not served with the writ of summons as he was in New Zealand. Thus, only the first and third defendants were before the court. However, both the defendants brought in third parties, naming three third parties, to wit:

- (1) Perunding Dayacipta, a firm, ('Perunding'); F
- (2) The Director, Public Works Department Sarawak ('the director'); and
- (3) The Government of Sarawak ('the Government').

And for purposes of this judgment I shall also be referring to the first defendant in the first action as 'the Government'. G

In both the first and second actions, the defendants and the third parties have disputed the claims. I shall therefore proceed to deal, firstly with the issue of liability in respect of both actions and should I find any liability I will then proceed to deal with the quantum of damages. However in view of the common incident upon which both these actions are based, I should perhaps outline at the outset, the common undisputed facts. H

THE COMMON AND RELEVANT UNDISPUTED FACTS

- (1) That on 16 February 1990 at about 10am there was an explosion and fire in the premises ('the premises') occupied by Public Bank Bhd ('Public Bank'), the fourth and third defendants in the first and second actions respectively; I

- A (2) That the premises occupied two shop lots, nos 292 and 293 ('shop lot nos 292 and 293') which were registered in the names of the second defendant ('Liew') and the third defendant ('Phua') respectively in the first action and the first and second defendants respectively in the second action;
- B (3) That Public Bank subleased the premises from Liew and Phua with effect from 28 October 1988. A draft memorandum of the sublease is exhibited as exh P1;
- (4) That Public Bank engaged a consultant, Perunding, to handle the renovation works in the premises, which commenced on 24 March 1989 and was completed on 29 April 1989. However, gas supply was not included in the renovation plans and it was not a subject to be considered before a certificate of fitness could be issued;
- C (5) That there was gas supply to shop lot no 292. However the Liew applied to have the supply disconnected with effect from 1 November 1986. Thereafter no bill of charges was received;
- D (6) That in shop lot no 293, there was never any gas supply and it was not on the list of accredited gas consumers;
- (7) That gas supply in Miri at all material times was under the care and management of the Government through the Public Works Department ('the PWD');
- E (8) That in 1988 the PWD carried out a gas metering exercise in Miri and shoplot no 293 was connected to the metering system although it was not on the list of accredited gas consumers;
- (9) That the 1 January 1990 and 5 February 1990 readings of the gas meter for shop lot no 293 indicated high usage of gas;
- F (10) That the deceased came to the premises that morning of 16 February 1990 in connection with the reassignment of the insurance policy for his housing loan with Public Bank. As a result of the explosion, the deceased was seriously injured and succumbed to his injuries in the evening of 16 February 1990 at about 8.20pm; and
- G (11) That the plaintiff in the second action was in the premises that morning of 16 February 1990 in order to see the manager relating to his cheque.

THE LIABILITY ISSUE

- H Having heard and read the evidence as a whole (oral and documentary) and after considering the submissions of learned counsel for the respective parties, the question of liability, in my view, should be determined based on the following issues:
- I (1) What was the cause of the accident, ie the explosion and fire, in the premises on 16 February 1990?
- (2) Was there any negligence involved in the accident?
- (3) Other basis of claims.
- (4) Specific defences as pleaded.

ISSUE 1 — CAUSE OF ACCIDENT

In respect of Issue 1, I shall deal with the first and second actions together.

As to what caused the explosion and fire in the premises, there are two crucial testimonies, namely that of PW3, Khoo Ah Kow and DW5 Nicholas Patrick, which require particular consideration besides the others. And having perused and considered the evidence, I am satisfied on a balance of probabilities that the explosion and fire on 16 February 1990 was due to the ignition of an inflammable mixture of gas and air in the premises. Gas was present in the premises, having leaked from the natural gas supplied by the Government through the PWD. PW3 in his evidence and in his report (exh P2) stated that that was the case. In his report, PW3 concluded thus:

Based on my overall examination and findings, I am of the opinion that the damage to the bank had been caused by a gas explosion which was a result of the following:

- (i) Gas had leaked into the bank through the floor in the manager's office and was trapped inside the bank.
- (ii) Eventually, when the gas/air mixture reached its explosive limit, any spark, eg electric sparks, or source of heat would have ignited the mixture causing it to explode.

Having considered his qualification which was not challenged, I accepted PW3 as an expert on the matter in which he was called to testify. Furthermore, DW5, though called by the Government, testified that, 'the probable cause of the explosion and fire was the gas and the gas could have come in from the natural gas supplied by JKR (PWD)'. This witness was also the chairman of the Board of Inquiry ('the Board') set up after the accident. The Board came up with findings and recommendations (see exhs P6A, 6B and 6C). I have also no reason to doubt the testimonies of the witnesses, in particular, PW3 and DW5. Incidentally, I find no submissions from learned counsel for the respective parties in these two actions, offering other explanations as to the cause of the accident.

ISSUE 2 — NEGLIGENCE

To determine the second issue the following elements should be considered, namely:

- (1) Who caused the accident?
- (2) Was there any duty of care?
- (3) Was there any breach of that duty of care?
- (4) Were there any consequential damage as a result?

I will first deal with the law on negligence.

Briefly, negligence may be explained as a tort involving the breach of a legal duty to take care, resulting in damage, undesired by the defendant, to the plaintiff.

In the oft-quoted case of *Donoghue v Stevenson* [1932] AC 562 at p 580, Lord Atkin made a generalized exposition of the law when he said:

- A The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of
- B complainants and the extent of their remedy. The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my
- C neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

And in *Caswell v Powell Duffryn Associated Collieries Ltd* [1939] 3 All ER 722, Lord Atkin in considering the issue of negligence, went on to highlight one matter when he said, at p 730:

- D ... And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrases you please, you must in the ultimate analysis be asking who 'caused' the injury: and you must not be deterred because the word 'cause' has in philosophy given rise to embarrassments which in this connection should not affect the judge.
- E Of course in the context of the present cases the relevant question should be: 'Who was or were responsible for the cause which inflicted the injury suffered by the plaintiffs?'

In his speech in the same case, Lord Wright reiterated the elements of negligence when he said this at pp 737 and 738:

- F Negligence is the breach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury, or the court in lieu of a jury.
- G It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man ... It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, and where negligence begins.

- H Recently, in *Page v Smith* [1995] 2 All ER 736 at p 739G, Lord Keith of Kinkel expressed his view that:

- I Liability for negligence depends upon proof both that it was reasonably foreseeable that injury would result from the act or omission called in question and that a relationship of proximity existed between plaintiff and defendant. Where the plaintiff is personally involved in a terrifying incident proof of proximity presents no problem. Where, however, the plaintiff is what may be described as a secondary victim proximity may be very difficult to establish.

In the same case Lord Lloyd of Berwick at p 760J stated that:

The test in every case ought to be whether the defendant can reasonably foresee that his conduct will expose the plaintiff to risk of personal injury. If so, then he comes under a duty of care to that plaintiff.

Another matter which also requires consideration is where the articles involved are dangerous in themselves.

In *Dominion Natural Gas Co v Collins* [1908–10] All ER Rep 61 the headnotes read:

In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed on those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that an accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then the defendant will not be liable. Accordingly, where a gas company installed in a repair shop of a railway company a plant for the supply of gas and negligently fitted a safety valve with an emission into the shop instead of into the open air, and there was an explosion, one of the railway company's servants being killed and another injured, it was held that the gas company was liable to the dependents of the dead man and to the injured man in damages for negligence.

In that case the Privy Council upheld the initial finding of negligence on the part of the gas company, the defendant, whose servants were under duty from time to time to inspect the apparatus installed and to see that it was in good order. It was also held that the defendant failed to show that the proximate cause of the accident was the conscious act of another volition.

With the foregoing principles of law in mind, I now return to the actions at hand. I will also proceed to deal with both actions together unless stated otherwise.

According to DW5 the standard adopted by PWD in the supply of gas in Miri prior to 1990 was acceptable in countries like Singapore and Australia. It was a low-pressure system at the maximum pressure of 10psi and reached users at only 0.3psi to 0.5psi. The conclusion of the Board according to DW5 was that the gas leaked through the corroded gas pipe found in the premises which then seeped through under the ceramic floor and thereafter went through the trunking, thereby being distributed into the different parts of the premises. I find that conclusion to be contrary to the finding of PW3. In his evidence PW3 said that from his examination he found the leakage to come from the gas pipe and through the floor in the manager's room of the premises. Anyway, I do not think it is crucial as to how the gas was distributed once in the premises. The pertinent questions to consider are:

- (1) Who supplied the gas?;
- (2) Was the gas supply made on request, and if not, why was it done?; and

- A (3) Were there any precautions taken before and after the gas supply was connected?

In respect of the first question, the answer is that the gas was supplied by the Government through the PWD. As regards the second question, it was the evidence of PW3 that the corroded gas pipe was found in the manager's room of the premises which happened to be on shop lot no 293. It is an undisputed fact that shop lot no 293 was not on the list of accredited gas consumers and there was never an application for gas supply. This was also the evidence of DW5. Hence, the supply of gas was not made on the request of the owner of shop lot no 293 or by Public Bank. Yet gas was supplied. Even for shop lot no 292 it was not challenged that as early as 1 November 1986, an application to disconnect the gas supply was made and no bill of charges was received since then.

- B
C
D
E Now, DW5 testified that a gas pipe within a building would have been installed when the building was constructed. There appears to be no challenge to this statement. However that should not mean that gas would be automatically supplied. DW5, under cross-examination by learned counsel for the plaintiff in the first action, admitted that there was a 1987 list of accredited gas consumers but it was not updated. This witness further admitted that even if the 1987 list was followed, the explosion could have been prevented by not connecting the gas supply to shop lot no 293 or to the premises. Unfortunately, according to DW5, not only was the 1987 list not updated, it was also not followed during the exercise of the meters installation in 1989. Hence, the gas meter was installed for shop lot no 293.

- F The evidence of DW5 appears to be in contradiction with that of PW8, Jeffery Philip. According to PW8, in 1989 he was doing the general supervision of the installation of gas meters in Miri which included the premises. The actual work was carried out by private contractors. As far as the premises were concerned, his subordinate, Chiew Kim Hua, was reporting to him on the installation of gas meters. It was also his evidence that prior to the installation, a list was given to him which included shoplot nos 292 and 293. When he was challenged to produce that list, PW8 came back, after being allowed to stand down, with a list which he said was the 1989 list. However, this witness was quick to say that the list he had in court was not the list that was given to him prior to the installation, but was only the copy. I pause to note that I cannot see the connection of the list he showed in court and the alleged list that was given to him prior to the gas meters installation. One reason for this, according to PW8, was that the list that was given to him was undated. If that was the case then I could not find any reason to believe that the list he showed in court, which he said was the 1989 list, was a copy of the undated list. Further, I found no explanation as to how PW8 could assume that the undated list was the 1989 list.

I I could not also accept the evidence of PW8 pertaining to the alleged undated list because he testified that he did not personally verify if the installation on shop lot nos 292 and 293 were proper and according to the list. This witness put the burden on his subordinate who was not called as

a witness by any of the parties to these actions. It is more important to note that if PW8 was so sure about the inclusion of the two shop lots in the alleged list, then he should have no doubt about the propriety of the installation. Furthermore, the Board, set up by the PWD to conduct the investigation, came up with a different finding. It is inconceivable that the Board would not have considered all the available evidence, including that of PW8 who was interviewed, before making its finding.

As such, I have no reason to disbelieve DW5 and the finding of the Board (see exhs P6A-C) that shop lot no 293 was not in the 1987 list of accredited gas consumers and that it was never a gas user.

Accordingly, it is my finding of fact that in installing the gas meters in 1989 there was no or insufficient precaution taken by the PWD to ensure that only accredited gas consumers were connected to the gas supply. In my view the PWD was duty-bound to ensure that only those in the list of accredited gas consumers or those who had applied for gas supply would be supplied with gas. That precaution was important to prevent non-consumers who might act or omit to act, which gas consumers normally would or would not do. There was therefore an obvious breach of duty on the part of the PWD.

Having installed the gas meters for the premises I find no evidence that steps were taken by the PWD to ensure safety. In fact PW8 testified that he could not recall but as far as he knew, the consumers were not told of the installation of gas meters in their premises. Neither did he know of any tests for leakage being carried out on shop lot nos 292 and 293 before the installation of gas meters. DW5 admitted that in 1989 there were no leak-detection tests being carried out in the internal plumbing for all gas consumers including the premises. He added that procedure (v) (para b, p 18 of exh 6(a)) was not 'strictly followed by whoever responsible'. The evidence of DW5 succeeded in nullifying the testimony of PW2, Datuk Micheal Parker, who said that before the explosion, the PWD did carry out checks which was an on-going process. Obviously PW2 was only relating an ideal situation.

The least the PWD could have done and was obliged to do was to inform the owners of shop lot nos 292 and 293 of the installation of gas meters in view of the absence of requests on their part for any gas supply. By doing that the owners or the occupiers would have been put on notice and it would have probably prompted them to check on any leakage in the premises.

I have also noted that there was no evidence adduced by the Government to rebut the allegation that although there were high readings on the meter for shop lot no 293, nothing was done. Nor were there any investigations being carried out by the PWD for such high readings. There was also no challenge to the evidence of PW8 that the isolation valves provided with the gas meters, including that of shop lot no 293, could be easily switched on or off by anyone in order to let gas into the supply line of consumers. There were no other safety devices adopted to prevent such tampering.

A Accordingly, it is my finding on a balance of probabilities that in respect of both actions, there were no or insufficient steps taken by the PWD and thus the Government, to ensure safety after the gas supply was connected to the premises. To my mind, the PWD and thus the Government had a major role in permitting the accident to occur through its acts and omissions. The inevitable conclusion could only be that there was a duty to take care on the part of the PWD and that duty was breached. In my view it was reasonably foreseeable that consequential damage could happen. It was also not disputed by learned counsel for the Government that gas is of a dangerous nature.

C Before coming to my finding I did consider the contentions of learned counsel for the Government on matters related to the second issue. Briefly, learned counsel submitted as follows:

- (1) That there was no evidence to show that the Government 'failed to construct, maintain and control its main pipes and meters and, after construction to keep the same so that gas would not escape therefrom' into the premises. Learned counsel said that even after the accident, tests carried out showed that the meters were functioning. He also made another statement that 'there is no evidence to show that the gas had escaped from the main pipes and meter of the Government into the bank';
- (2) That shoplots nos 292 and 293 were gas users before;
- (3) That the inspection for leakages was an on-going exercise but that the premises were not inspected before the accident;
- (4) That the maxim 'res ipsa loquitur' does not apply as the cause of the accident is known;
- (5) That Liew and Public Bank could not deny knowledge of gas supply to the premises as there was evidence to show that gas escaped from the corroded gas pipe on the ground floor of shop lot no 293;
- (6) That the gas pipe must have been interfered with during the renovation of the premises, thereby exposing it and thus aggravating its corrosion;
- (7) That the staff of Public Bank smelt something but took no action;
- (8) That the renovations of the premises were done without the approval of the Miri Municipal Council. Hence, no one alerted Public Bank on the position of the gas pipe; and
- (9) That the safety valves were turned off after the meters installation. However, anyone could have turned the valves on. The safety valves were of a standard system used by other countries.

I In respect of contention (1) above, I think learned counsel for the Government missed the point. As stated hereinabove, the primary consideration should be the absence of or the inadequate precautions taken in installing the gas meters and reconnecting the gas supply to the premises when there was no request to do so. That was not rebutted by way of evidence adduced.

I have already stated my reason for preferring the evidence of DW5 on the 1987 list of accredited gas consumers. Thus, contention (2) fails.

As for contention (3), it only goes to show that the Government knew of its responsibility to check for leakages. Hence, it should not be argued now to say that the Government had nothing to do with the leakage of gas in the premises prior to the accident.

For contention (4) I think there should be no dispute that it has no application in this case. Learned counsel for the plaintiff in the first action even conceded to that point.

And for contention (5), evidence adduced indicated that the PWD did not inform consumers even after installing the gas meters. Thus, the owners and the occupiers of the premises could not be expected to know that gas supply was reconnected. Even after the high readings of the meter for shoplot no 293, the PWD did not make any investigation or at least a check with the occupier whether the consumption was justified.

I will deal with contentions (5), (7) and (8) later in this judgment. Finally, in relation to contention (9), it may be true to say that it was an accepted safety standard system. However the fact remains that such safety valves should not have been there in the first place if PWD was careful in executing its duty when installing gas meters in 1989.

Consequently, gas being a dangerous article, as conceded by learned counsel for the Government, was allowed into the premises. If it was mandatory for the PWD to install gas meters in all buildings in Miri as suggested by PW8 in his testimony, then it was only appropriate that before doing so, checks for leakages should have been done. Unfortunately, in this case reconnection to the gas supply was done first. As was testified by DW5, procedure (v) was not strictly followed.

In respect of Liew, in both actions I find as a fact that he had no part in bringing or allowing the supply of gas into the premises. The undisputed fact favours him. There was also no evidence adduced to show that Liew was under an obligation to ensure the safety in relation to the supply of gas to the premises under the memorandum of sublease with Public Bank; and going by the evidence adduced, the source of the leak was the corroded gas pipe in shop lot no 293 and not in shop lot no 292. The inevitable conclusion therefore is that Liew had no part in the cause of the accident or in causing the explosion and fire in the premises. With this conclusion, I am satisfied on a balance of probabilities that no blame should be levelled against Liew in both actions.

As for Public Bank, it is my finding based on the evidence adduced that it could not be held responsible for bringing or allowing the supply of gas into the premises. Similarly, there was no evidence adduced to show that Public Bank had the knowledge of the supply of gas when it took possession of the premises. Hence, there was no basis for the contention of learned counsel for the plaintiff in the first action that Public Bank or its employees or agents did not take precautions in relation to the safety of the gas pipe when the renovation works were done. There was also no evidence adduced that Public Bank knew of the existence of the gas pipe in the course of the renovation works. Thus, it is my view that Public Bank could not be expected to take steps at that point in time.

- A However I find merit in the argument that Public Bank, through its employees, including the branch manager, failed to take steps after becoming aware of the unfamiliar smell in the premises. One Marcell Usop @ Usop bin Pak ('PW4'), testified that prior to the accident, he smelt gas when he reported for work at 8.40am that morning of 16 February 1990. This witness also said that as he smelt benzene it prompted him to ask the guard
- B on duty if motorcycles were parked inside the premises. The reply was in the negative. That should have triggered him to check further. After all this witness testified that he spoke to his branch manager about the smell on 15 February 1990 but the latter did not do much except to use the air freshner in his room. Further, one Wilson Ling Kuai Kwong ('PW9') corroborated
- C PW4 when he said that he smelt something one month before the accident but did not know what it was.

- It is obvious from the evidence that none of the employees of Public Bank did anything although the smell, whether it was benzene or something else, should have prompted them to investigate. There was no evidence
- D adduced to explain the inaction of the employees. Thus, the omission on the part of Public Bank, through its staff, to a certain degree led to the happening of the accident. For that, it is my finding that some blame should be attributed to Public Bank. As to what extent, I will deal with that later. Due to the nature of the business of Public Bank it would have been reasonably foreseeable for its customers and members of the public to have
- E dealings with it in the premises during banking hours; and it was only reasonable that they expected the premises to be safe for its purpose. As such, Public Bank owed a duty and should have taken all reasonable precautions to ensure their safety while in the premises. As its staff did not do anything even with the persistent smell (according to PW4 he smelt
- F gas), Public Bank should therefore be held vicariously responsible for the breach of the aforesaid duty. The consequence of course was the accident whereby the deceased in the first action and the plaintiff in the second action suffered death and injuries respectively. Those consequences in my view, were reasonably foreseeable bearing in mind the nature of gas. Thus, to that extent, contention (7) of learned counsel for the Government has
- G some basis.

- Public Bank contended through its learned counsel that no blame should be put upon it as it relied on Perunding to do the renovation works in the premises. That reliance was placed upon Perunding to do the works properly. Thus, it was argued that Perunding should have ensured that the
- H premises was a safe place of work. Learned counsel also added that Perunding should also be liable for failing to remove or disconnect the existing gas pipes in the premises in breach of its duty of care to the staff and customers of Public Bank. With respect, submissions of learned counsel for Public Bank can only be appreciated if evidence to that effect has been adduced before this court. Unfortunately, not a shred of evidence
- I was adduced to that effect. The witnesses called by learned counsel for Public Bank, namely, Deputy Superintendent of Police, Fauzie Saadi ('DW6') and one Christie Lee Sook Jun ('DW7'), did not refer to the renovation works in the premises. In any event, I find the argument to be

quite irrelevant in view of my finding hereinabove as to why Public Bank should share the blame for the accident. A

If the intention is to associate Perunding with the blame, then with respect, I find no basis for the reasons as follows:

- (1) The evidence of Norman Choo ('DW3'), shows that the Miri Municipal Council (the local authority responsible for the approval of building plans and the issuance of occupation permits in the Miri Municipality) was never concerned with the supply of gas to buildings. Indeed, according to DW3, the supply of gas was never quoted in the check-list for building plans. Hence, there is no basis to say that by failing to get the approval for the renovation plans, Perunding was at fault and in breach of its duty to take care. B C

I also find the evidence of Shafie bin Madom ('DW2'), irrelevant. This witness testified that the Town Planning Section of the Lands and Surveys, Miri was only involved on the aspect of land use and not on the structure, if it was only an internal renovation, as was the case here. D

- (2) One Sim Ching Yaw ('DW9'), who was engaged by Perunding to do the renovations of the premises, testified that he only did the laying of Italian tiles on the floor of the premises. He also did the renovations of the wall partition and the ceiling but he did not hack any part of the ground floor. He did not see any pipe on the surface of the ground floor. Due to the uneven level of the ground floor, DW9 also said that he topped it up by adding another layer of cement above the existing floor. E

Another witness, one Wong Ping Huat ('DW10'), was called. He testified that he was the electrical contractor who was also engaged by Perunding for the renovation of the premises. According to him he did the electrical and telephone renovations. The telephone works involved the placement of trunkings and junction boxes in accordance with the drawing plans supplied by Perunding. However DW10 maintained that the trunkings were laid on the existing concrete floor and thus the floor was not hacked. As for the concrete that covered the trunkings and junction boxes, DW10 admitted that he did not do it. When he was further queried, DW10 explained that there was no need to dig into the existing floor as there was a difference of two inches in the floor level between shoplot nos 292 and 293 and the trunkings were only one inch thick. This witness also stated that he did not see any gas pipe in the premises nor did he know of the presence of gas pipes therein. F G H

Based on the evidence of DW9 and DW10, I find no evidence indicating that Perunding, through its contractors, did not do the works properly or that the contractors meddled with the gas pipes in the premises. There was also no evidence from the other witnesses, particularly PW3, that indeed the original floor was hacked, especially around the area where the corroded gas pipe was found. Hence, there is nothing in the evidence adduced in support of the contentions of Public Bank against Perunding. As such I find no blame attached to Perunding in so far as the second issue I

A is concerned. With this finding contentions (6) and (8) of learned counsel for the Government also fail.

As for the claim by Public Bank against the director and the Government in the second action, my earlier findings against the Government in the first action stand. Thus, I am satisfied on a balance of probabilities that Public Bank has established its averment as contained in para 8 of the statement of claim against the director (the second third party) and the Government (the third third party).

As for Liew, in view of my earlier findings, there is therefore no necessity for me to deal with his claim against the director and the Government.

C In respect of the consequences of the accident, it is an agreed fact that the deceased in the first action was injured and thereafter passed away as a result of the explosion and fire in the premises. As for the plaintiff in the second action, I find based on the evidence adduced, that he also sustained his injuries due to the explosion and fire. No evidence was D adduced by the defendants or the third parties in the second action which rebutted the averment of the plaintiff as to the cause of his injuries.

Accordingly, I am satisfied that the consequences of the explosion and fire in the premises as pleaded by the plaintiffs in the first and second actions respectively have been duly established on a balance of probabilities.

E In view of my findings hereinabove, on a balance of probabilities, I find that the plaintiff in the first action has established negligence as pleaded in para 7, particulars (b) to (i) and in particular, para (g) of the statement of claim against the Government and Public Bank respectively. Based on the fact that gas is a dangerous article, the Government and F Public Bank owed a duty of care to those in the position or class of the deceased at the material time (see *Dominion Natural Gas Co v Collins* [1908-10] All ER Rep 61). Through the acts and omissions as discussed hereinabove, there was a breach of that duty that led to the explosion and fire in the premises, thereby causing injuries and death. It was reasonably foreseeable that injuries would result to other persons or properties in the G event of such breach of duty. The premises, being a bank and accessible to customers in particular and to the public in general, it was reasonably foreseeable that customers and members of the public might be present especially during the banking hours.

H Similarly, I am also satisfied on a balance of probabilities that the plaintiff in the second action has proved his case on the plea of negligence against Public Bank as particularized in item 3 of para 6 of his statement of claim. As Public Bank has named the director and the Government as third parties and in view of my findings concerning the PWD and thus the Government in the first action, the claim of Public Bank against them as pleaded in para 8 of the statement of claim against the second and third I third parties has also been established on a balance of probabilities.

ISSUE 3 — OTHER BASIS OF CLAIMS

Besides negligence as the basis of her claim, the plaintiff in the first action also pleaded the following:

- (1) Breach of duty of care on the part of Public Bank as an occupier; A
- (2) Escape of gas being a dangerous thing; and
- (3) Public nuisance.

As for the plaintiff in the second action, he also founded his claim for relief on:

- (1) Escape of gas being a dangerous thing; and B
- (2) Public nuisance.

However, in his final submissions learned counsel for the plaintiff in the first action did not pursue the issues of the escape of gas and public nuisance. Hence, I shall only deal with the issue of whether Public Bank as the occupier of the premises was in breach of duty of care towards the deceased as pleaded in para 8 of the re-amended statement of claim. C

It was not in dispute that Public Bank was the occupier of the premises. However Public Bank contended that it had taken all reasonable care to ensure the safety of its visitors or customers by employing a consultant to oversee the renovations of the premises. Further, it was also stated in its defence that at all material times the gas in the premises was invisible and odourless, thus undetectable by ordinary reasonable means. D

Before making any finding of liability as an occupier, it must be determined whether the deceased was an invitee or lawfully in the premises at the material time. There was no challenge to the reason for the deceased to be in the premises that morning. Thus, he was in fact a customer of Public Bank. He was in the premises for a business purpose of material benefit to the occupier, Public Bank. There was in fact a common interest between the deceased and Public Bank. Accordingly, the deceased could not be described as anything else but an 'invitee' under common law. E F

As an invitee, was there a duty owed to the deceased by Public bank as the occupier?

In *Indermaur v Dames* (1886) LR 1 CP 274 Willes J stated the duty owed in the following terms:

And with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact ... G H

Under the English common law which applies in Malaysia, an occupier is therefore under a duty to prevent damage or injury to an invitee or visitor due to unusual dangers on the premises which he knows or ought to know and which the invitee or visitor does not know about. I

The statement of the law in *Indermaur v Dames* has been consistently applied or referred to by the courts of this country (see *Lau Tin Sye v Yusuf bin Muhammad* [1973] 2 MLJ 186; *Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors* [1983] 2 MLJ 51; *Nippon Yusen Kaisha v WA Balch* [1954] MLJ 53).

A And as to the onus of proving unusual danger, his Lordship Seah FJ in *Lee Lau & Sons Realty Sdn Bhd v Tan Yah & Ors* said this at p 54:

The onus of pleading and proving 'unusual' danger which the appellants (defendants/occupiers) knew or ought to have known, rests on the respondents (plaintiffs) and since they had failed to establish it, the appellants owed no duty of care to the deceased.

B

In respect of the meaning of 'unusual risk' Seah FJ in the same case quoting *London Graving Dock Co Ltd v Horton* [1951] AC 737 said 'that an "unusual" risk is one which is not usually found in carrying out the task which the invitee has in hand.'

C

In the present case the premises was used for banking business. Surely no customer would expect to find gas, an admittedly dangerous thing, in such a place. Thus, the danger was unusual to the deceased and unknown to him at that material time.

D

But did Public Bank know or ought to have known of the danger? It would appear to be so. Public Bank, through its staff members, ought to have known of the danger. PW4 gave evidence that he smelt gas that morning of 16 February 1990 when he reported for work. However, nothing much was done. The fact that PW4 smelt something demolished the contention of Public Bank that the gas, at all material times, was odourless. Indeed, PW9 said that he smelt something as early as one month before the accident. However no one bothered to investigate or call the authorities to do so. In short, nothing was done other than the fact that the branch manager used air freshener in his room. No doubt at that time there were no reported accidents due to gas explosions in Miri. The state of knowledge at that time should be considered in determining whether the staff of Public Bank ought to have known of the danger; but it should be common knowledge then that gas was piped to the kitchens in Miri and thus inflammable. After all PW2 gave evidence that the supply of gas in Miri was started by Shell and handed over to the PWD in the 1950s. Hence the nature of gas at that time was not something extraordinary and unknown. Accordingly, due to lack of any action taken by the staff of

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Public Bank even with the smell prevailing for about a month, I find that Public Bank through its staff did not take any reasonable or any reasonably sufficient measures to meet its duty as the occupier towards the deceased, an invitee. I am therefore satisfied on a balance of probabilities that the plaintiff in this first action has established para 8(h) of the re-amended statement of claim, and thereby establishing the liability of Public Bank being the occupier of the premises. Of course this finding may also be taken as the alternative in the event that I was wrong in my earlier finding of negligence on the part of Public Bank.

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In respect of the second action I will first deal with the escape of gas. In para 5 of his statement of claim, the plaintiff stated, inter alia, that 'gas is a dangerous thing and the defendants (Liew, Phua and Public Bank) are liable to the plaintiff for the aforesaid damage caused by the escape of the gas ...'. It is to be noted that neither the PWD nor the Government was made a party. In view of my finding as to how the gas was brought into the

premises, I do not think there is any basis for this particular averment. There was not a shred of evidence that it was the defendants who collected and kept the dangerous thing. Furthermore, I also find no evidence adduced by the plaintiff that the defendants or any of them, while they knew or ought to have known about the gas, acted or omitted to act, thereby allowing the escape of the gas. Thus, this particular cause of action of the plaintiff fails as against all the defendants in this second action.

By virtue of para 7 of his statement of claim, the plaintiff also pleaded that 'the defendants, their tenants, agents or servants failed to construct their pipes in the said building of the Bank and that after construction failed so to ensure that the gas in dangerous quantities would not escape therefrom and thereby maintain a public nuisance ...'.

I pause to note that the plaintiff founded his cause of action on public nuisance. Public nuisance is 'one which inflicts damage, injury or inconvenience on all ... or on all members of a class who come within the sphere or neighbourhood of its operation. However, it may affect some to a greater extent than others. The issue of whether the number of persons affected is sufficient to constitute a class is one of fact' (34 *Halsbury's Laws of England* (4th Ed) para 305). Commonly, a public nuisance is a crime, but if any person has suffered special damage over and above that suffered by the rest of the public due to the public nuisance, then that person can sue in respect of it.

For the present case I am not satisfied that the allegations made thereof have been proved by the plaintiff. Firstly, on the basis of my finding as to the circumstances of the gas coming into the premises, I do not think there should be any question of the defendants being expected to do as averred by the plaintiff. As such there is no issue that the defendants or any of them created or continued a public nuisance. Secondly, there was no evidence adduced that the public was affected generally and that the plaintiff suffered special damage arising therefrom. In *Sedleigh-Denfield v O'Callaghan & Ors* [1940] 3 All ER 349 at pp 365 and 366, Lord Wright said:

Though the rule has not been laid down by this House, it has, I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable, a further condition is necessary — namely, that he had knowledge, or means of knowledge, that he knew, or should have known, of the nuisance in time to correct it and obviate its mischievous effects.

... The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that, with ordinary care in the management of his property, he should have realized the risk of its existence. This principle was affirmed in *Barker v Herbert* [1911] 2 KB 633. That was the case of a public nuisance constituted by a defective railing dividing the area of the defendant's house from the highway. A boy, playing, fell and was injured, and claimed damages. Though the nuisance was a public nuisance, and though a public nuisance, in many respects differs, or may differ, from a private nuisance,

- A yet there is, in my opinion, no difference, in the respect here material, which is that, if the defendant did not create the nuisance, he must, if he is to be held responsible, have continued it, which I think means simply neglected to remedy it when he became, or should have become, aware of it.

- B On the facts of the present case I do not think therefore that the plaintiff has shown or has satisfied on a balance of probabilities, the elements stated in the afore-mentioned case. There was no reason for the defendants, in particular, Public Bank, to ensure the good condition of the gas pipes when there was no request for the supply of natural gas. Hence, this cause of action of the plaintiff in this second action also fails.

- C Finally, I make no finding on occupier's liability in this second action as that was not pleaded.

ISSUE 4

- D In the first action, it appears that only the Government pleaded a specific defence as contained in para 7 of the re-amended defence. Briefly, the defence is that the on-line isolation ball valves were tampered with by person or persons unknown and unauthorized by the Government. I have already dealt with this point earlier on in this judgment whereby I found it to be without merit. To add to what I have stated hereinabove, I must say that I found no evidence adduced by the Government to establish that plea.
- E No one was called to testify that indeed the on-line isolation ball valves for the premises were closed after the installation. Of course nobody showed any evidence of tampering. Further, it is also contrary to common sense if the averment of the Government is to prevail. It may mean that no liability can ever be attributed to anyone who knows an article to be dangerous yet leaves it where any third party can have access. Surely
- F common sense dictates that in such a situation reasonable precaution should be taken to prevent access to any stranger. Sadly, it is obvious to me that the Government, through the PWD, took no such precautions at any time before the accident.

- G Thus, I find no merit in the defence as pleaded in para 7 of the re-amended defence of the Government. As the same defence was raised by the director and the Government in their defences against the claim of Public Bank in the second action, I should therefore maintain the same conclusion.

- H In respect of the second action, Public Bank by para 10(c) of its re-amended defence pleaded that the maxim *volenti non fit injuria* should apply against the plaintiff. The same plea was also adopted by the second defendant. However, as I do not attach any liability on him, my consideration will only be confined to Public Bank.

- I It was the contention of learned counsel for Public Bank that in this second action the maxim should prevail against the plaintiff for the following reasons:

- (1) That the plaintiff admitted to being aware of the presence of gas outside the premises when he visited Public Bank on 30 January

1989. However, he did not inform anyone when he was morally obliged to do so, being an engineer and a councillor;

- (2) That the plaintiff also admitted smelling gas when he went into the premises that morning of the accident; yet he did not warn anyone of the imminent danger which he was aware; and
- (3) That knowing the hazard that morning, the plaintiff waited for the manager inside the premises. His main concern was to sign his cheque and to leave as soon as possible. By so doing the plaintiff impliedly consented to the risk and that he assumed the risk.

Obviously, from the submissions of learned counsel for Public Bank, he seems to portray that the maxim can be applied in an ordinary situation. However, it was held in *Teh Hwa Seong v Chop Lim Chin Moh & Anor* [1981] 2 MLJ 341 that 'to succeed in raising such a defence the defendants had to prove that the plaintiff had, voluntarily and freely with full knowledge of the nature of the risk he ran, impliedly agree to incur it' (per Yusof Abdul Rashid J at p 342). In *Bowater v Rowley Regis Corp* [1944] KB 476, Scott LJ said at p 479:

a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

This foregoing passage was cited with approval by Lord Hodson in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656. Hence, the basic element is that the consent must have been freely given.

Learned counsel for Public Bank also appears to think that consent to physical risk should be sufficient for the defence to succeed. But opinions have also been expressed by learned authors in law that consent should not simply be on the physical risk but to the legal risk as well, that is, the risk of actual damage for which there will be no redress at law. Such a situation may arise where a plaintiff has contracted to bear a particular risk himself. I am inclined to think that that should be the law.

It must also be noted that although the test of consent is objective, it should not be taken that just because a person knows of the risk it must be assumed that he has assented to it (see *Bennett v Tugwell* [1971] 2 WLR 847; *Letang v Ottawa Electric Railway Co* [1926] AC 725). Indeed, in *Slater v Clay Cross Co Ltd* [1956] 2 QB 264 Denning LJ said at p 271 that 'knowledge of the danger is not a complete bar. It is a factor in contributory negligence, but is not a bar to the action'. Incidentally, Public Bank in the second action did not raise the issue of contributory negligence.

In considering therefore the defence as pleaded in the light of the principles of law as discussed, I am not convinced that Public Bank has established the defence on a balance of probabilities. There was no evidence that the plaintiff freely consented to the risk. Although he might have known of the risk, that should not be taken that he impliedly assented to it. After all Public Bank was opened for business and the plaintiff was compelled to a certain degree by circumstances to go to the premises. He might have known of the risk but I do not think he has full knowledge of

- A the nature of the risk he ran. In relation to his moral duty as contended by learned counsel, I find that to be irrelevant in considering the issue at hand.

Accordingly, the defence as pleaded fails for the reasons above-stated.

B CONCLUSION ON LIABILITY

For the above reasons it is my conclusion that for the first action the Government and Public Bank are liable for negligence. Further or in the event that my finding against Public Bank on negligence is wrong, I also find Public Bank liable for having breached its common law duty as the occupier of the premises.

- C In respect of the second action my conclusion is that Public Bank is liable for negligence. As the director and the Government were made third parties by Public Bank, it is also my finding that Public Bank succeeded in its claim against them.

- D That however is not the end of the matter. In view of my earlier finding that the liability of the parties could not be equal, I must now apportion the liability.

- E Bearing in mind the events leading to the accident, inter alia, the negligent act of the PWD in reconnecting gas supply into the premises in the absence of any request and the occupier of the premises was not an accredited gas consumer, in my judgment, the Government being vicariously liable for the negligence of the PWD and/or the director, should bear 90% of the liability. The remaining 10% of the liability should be borne by Public Bank for negligence and/or for the breach of its common law duty as the occupier of the premises. That of course is the position in respect of
- F the first action where the Government and Public Bank are the defendants.

- G In the second action, Public Bank was made a defendant but not the Government which was only brought in as a third party. Should the 10% liability be the basis as between Public Bank and the Government, including the director? Learned counsel for the relevant parties did not address their minds on this point in their submissions. Anyway, the authorities seem to state that 'if each of several persons, not acting in concert, commits a tort against another person substantially, contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage', per Choor Singh J in *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 at p 245 with references to *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 and *Drinkwater v Kimber* [1952] 2 QB 281.
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In view of the apportionment of the liability amongst the parties liable in both actions, the quantum of damages should be apportioned in that manner accordingly.

I QUANTUM OF DAMAGES

THE FIRST ACTION

There appears to be not much dispute on the evidence adduced relevant to the issue of quantum. At the time of the accident the deceased

was 37 years old and was a senior foreman with Shell Sarawak Bhd. He was receiving a basic salary of RM2,738 per month and a monthly allowance of RM450. In addition, the deceased was entitled to an annual bonus of two months of his basic salary. This was what Mr Gerawat Jala (PW10) said in his evidence and which was not contradicted by the Government or Public Bank. A subsidized interest on housing loan was another entitlement whereby the deceased only had to pay 3% per annum of the interest with the balance being paid by his employer. Thus, with the salary, allowance and bonus, the average monthly income of the deceased at the time of his death was RM3,644.33. A B

The testimony of the plaintiff was not challenged by the Government and Public Bank. This witness testified that the dependants of the deceased at the time of his death were herself, the four children of the marriage and the elderly parents of the deceased. To upkeep the family she required RM2,400 per month at that time. The plaintiff said that the deceased gave them a monthly sum of RM500 for his parents. There was also no dispute that the deceased was a non-smoker and a non-drinker and thus he required only about RM10 per day for himself. C D

General damages for loss of dependency

In his submissions learned counsel for the plaintiff in this first action stated that the multiplier should be on the basis of s 7(iv)(d) of the Act and thus, it should be: $(55 - 37) \div 2 = 9$ E

There was no challenge to this computation by learned counsel for the Government and Public Bank.

As for the multiplicand, learned counsel for the plaintiff calculated it to be RM2,900. He arrived at that figure after deducting 20% for living expenses of the deceased from his average monthly income at the time of death. Hence, the figure of RM313,200 was submitted as the general damages for loss of dependency calculated on $RM2,900 \times 12 \times 9$. F

On the other hand, learned counsel for the Government submitted that the gross income per month of the deceased should be RM3,140 from which income tax of RM447, dental charges of RM56, service charge of RM80 and personal expenses of RM270 should be deducted. He therefore came up with a figure of RM2,287 as the appropriate multiplicand. G

Meanwhile, learned counsel for Public Bank made no submission on the general damages for loss of dependency.

In view of the undisputed facts I should only now consider the appropriate multiplicand. Firstly, on the gross monthly earnings of the deceased as stated by learned counsel for the Government, the fact that the deceased was entitled to an annual bonus of two months of the basic salary was omitted. That figure should be added. The average monthly income must take into account the tax payable (see *Nani v WG Williams* [1986] 2 MLJ 68). From the last salary slip of the deceased (exh P1) the monthly tax deduction was RM447. Further, the personal expenses and costs of earning the income of the deceased should be deducted. In this case learned counsel for the plaintiff submitted that it should be 20%, which I agree. Thus, the computation should be as follows: H I

A	Total monthly income is RM2,738 + RM450 =	RM3,180
	Deduct income tax :	RM447
	Deduct personal expenses and costs of earning (about 20% of RM3,180) :	RM600
B	Balance :	RM2,133 per month
	And per year will be :	RM2,133 x 12
		= RM25,596
C	Add two months bonus, less income tax :	RM4,582
	[RM5,476 – RM894 (tax)]	
	So nett income per year is :	RM25,596 + RM4,582 = RM30,178
D	And the average monthly income is :	RM2,514.83
	(RM30,178 ÷ 12)	

Thus, the multiplicand should be RM2,500 to round up the figure. Therefore the total general damages for loss of dependency should be: $RM2,500 \times 12 \times 9 = RM270,000$

E However, I should deduct for contingencies, other vicissitudes of life and accelerated payment, a sum equivalent to one-third thereof, thereby leaving the balance payable in the sum of RM180,000.

I did not take into account the other charges as shown in the last salary slip of the deceased since there was no evidence that those charges were monthly in nature. For the same reason I did not include the other allowances which were shown therein and the off-shore allowances of the deceased.

As for the apportionment of the sum awarded as general damages for loss of dependency, I think the fair percentage should be as follows:

G	(1) the wife, Takong Tabari @ Takung Tabari, aged 40 years and now remarried	20%
	(2) Joyce Jeffrey Satuk, aged 16 years	15%
	(3) Martina Jeffrey, aged 15 years	15%
	(4) Joffey Jeffrey, aged 13 years	20%
H	(5) Joice Jeffrey Satuk, aged 10 years	20
	(6) Tama Gabar, aged 65 years	5%
	(7) Sinah Gabar, aged 65 years	5%

Damages for bereavement

I The sum of RM10,000 as damages for bereavement should be payable to the wife of the deceased pursuant to s 7(3A) of the Act.

Special damages

Learned counsel for the plaintiff did not pursue the other claims under special damages except for the funeral expenses and loss of interest subsidy on the housing loan. A

For the funeral expenses no evidence was adduced as to the exact sum spent. However, this court should be allowed to consider a figure, as it could not be denied that expenses would have been incurred (see *Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153). Hence, the sum of RM3,000 as submitted by learned counsel for the plaintiff is not excessive and I allow it. B

In respect of the loss of interest subsidy on the housing loan, I find no evidence adduced indicating that indeed an actual loss has been suffered by the plaintiff or the estate of the deceased. It was not in dispute that there was an existing loan of the deceased at that time with the Standard Chartered Bank. It was for the purpose of re-assigning the insurance policy to his housing loan with Public Bank that he was in the premises that morning. Hence, it is fair to say that there must have been an existing insurance policy related to the housing loan with the Standard Chartered Bank. Nothing was shown as to what happened to that insurance policy. If payment was actually made from the policy, then in my view there should be no question of any loss of interest subsidy on the housing loan. Although this court should not speculate, the fact remains that I am not satisfied that this head of claim under special damages has been established. As such I disallow it. As was said by Lord Goddard in *British Transport Commission v Gourley* [1956] AC 185 at p 206 that 'in an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved'. C D E

Damages to estate of deceased under s 8 of the Act F

The Government and Public Bank posed no challenge to the testimony of the plaintiff, as to the condition of the deceased after the accident. Thus, it was not in dispute that the deceased died ten and a half hours after the incident which happened at about 10am and the deceased passed away at about 8.30pm on the same day. According to the plaintiff the deceased was in great pain prior to his death and fully conscious as he could relate to her what actually happened that morning. G

Now, the amendments to the Act did not alter the right of the estate of a deceased person to claim damages for pain and suffering if death was not instantaneous and the deceased person was conscious prior to his death (see *Mariah bte Mohamed v Abdullah bin Daud* [1990] 1 MLJ 240). H

Thus, in the present case the claim of the plaintiff is not without basis in view of the evidence before the court. However due to the short period prior to death I do not think the claim for RM10,000 can be supported. In *Mariah bte Mohamed v Abdullah bin Daud* the award for pain and suffering prior to death was RM1,500. The period before death was five months and 18 days. Thus, the sum of RM3,000 for pain and suffering in this case should be adequate. I

In summary therefore the awards are as follows:

- A (1) General damages for loss of dependency : RM180,000
(To be apportioned as stated above and the sums allotted to the children under the age of majority shall be paid to the public trustee in trust for them pending attainment the age of majority in each case but with liberty to apply for their expenses as and when necessary.)
- B (2) Damages for bereavement : RM10,000
(3) Special damages (funeral expenses) : RM3,000
(4) Damages to estate under s 8 of the Act (pain and suffering) : RM3,000
- C (5) Interest at the rate of 3% per annum on special damages from the date of accident of the date of trial (*Nani v WG Williams* [1986] 2 MLJ 68);
(6) Interest at the rate of 8% per annum on the judgment debt from the date of judgment until realization; and
- D (7) Costs to the plaintiff to be paid by the Government and Public Bank.
As indicated above, I find the degree of liability between the Government and Public Bank to be in the ratio of 90:10 and hence the same ratio should apply in respect of the quantum (see *Kathavarayan v Ng Sup Moi & Anor* [1987] 1 MLJ 246).
- E And since no liability is found against the second defendant I award him costs to be taxed in the exercise of my discretion.

THE SECOND ACTION

- F The plaintiff in the second action gave evidence pertaining to the extent of his injuries which was 36%–37% of second and third degree burns and multi-laceration. He also testified about the pain he suffered and the several operations he underwent for skin graft. To highlight the disfigurement on his body, the plaintiff tendered photographs of himself (exhs P10) and also showed the court scars on his hands and fingers. Receipts and bills for his medical expenses were also tendered (exhs P11A
- G P11B). According to the plaintiff his doctor told him that he would require two further operations. No challenge was made to this portion of the evidence of the plaintiff.

- H As for his claim for pre-trial loss of earnings, the plaintiff submitted the salary scale of the Association of Consulting Engineers, Malaysia (exh P10) and his income tax year of assessment 1990 (1989 income) (exh P10) upon which he said that his daily average earnings during that period was in the sum of RM250. His medical leave from the date of the accident to the date of commencement of this action came up to 505 days. Whereas from 1 May 1991 to 31 July 1991 the plaintiff said that he was medically advised to do light work and therefore he should be entitled to claim half
- I of what he claimed to be his daily earnings of RM250.

In challenging the claim for loss of earnings, learned counsel for Public Bank contended that the plaintiff must show evidence of actual loss. The case of *Yee Hup Transport & Co & Anor v Wong Kong* [1967] 2 MLJ 93 was cited where at p 94 his Lordship Ong Hock Thye FJ said:

The real question was whether he was in any way less capable of going about his normal occupation. If so, then and then only, would arise the assessment of the pecuniary loss resulting therefrom. Loss of earning capacity is a horse of a different colour from loss of amenity.

In that case the actual loss of earnings was reduced from RM8,400 to RM2,200.

It was also submitted by learned counsel for Public Bank that the arbitrary figure of RM250 as the loss per day should not be accepted as the actual loss. After all, learned counsel added, the firm of the plaintiff in fact experienced increase in earnings in 1990 and 1991. That however was attributed by the plaintiff to the billings for works done previously.

In considering the actual loss of the plaintiff I bear in mind that neither Public Bank nor the Government disputed the medical leave that was given to the plaintiff and the days he was medically advised to do light duty. Nevertheless, I paused to ask whether the plaintiff had actually lost earnings for that period. In his evidence he admitted that his earnings for 1990 was RM60,000 and for 1991 it was RM82,000. For his 1989 gross earnings it was RM81,653. Hence, there is no doubt that the plaintiff/his firm was earning in 1990 and 1991. It was also admitted by the plaintiff that he had assistants to help him; and the nature of his work as a civil engineer had been consultancy work which included drawing and advising on plans.

Thus, to agree to the suggestion of the plaintiff that he should be paid at the rate of RM250 per day for the period he was on medical leave, would totally ignore the fact that his firm was earning during that period. Further, to do so would tantamount to enable the plaintiff to make a profit or to reward him instead of merely to compensate him as required under the law. In the case of *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 his Lordship Syed Agil Barakbah FJ said this at p 334:

It has to be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate.

It is also unfortunate that while saying that the earnings for 1990 and 1991 were for works previously done, the plaintiff failed to substantiate such an averment by way of actually producing the relevant documents or by calling witnesses who might have the knowledge of his financial affairs at that time. There was also no evidence adduced indicating that the firm of the plaintiff during those years secured no jobs or that they were available but were not secured due to the absence of the plaintiff. It was also not shown that if not for the medical leave of the plaintiff, the fruits of his labour in 1990 and 1991 would have manifested in the form of higher income in later years. I am therefore not satisfied on a balance of probabilities that the plaintiff suffered actual loss of RM250 per day during his medical leave. In my view the appropriate approach in this case should be to consider the trend of the earnings of the plaintiff from 1989 onwards. That year the earnings of the plaintiff after tax was RM72,693. For 1990 and 1991 I assume those figures were before tax as the plaintiff failed to

- A produce his tax returns for those years. Thus, it appears to me that it is quite safe to say that the gross earnings of the plaintiff between 1989 and 1991 were in the region of RM80,000 per annum. There is however no doubt that there was a drop of income in 1990. Accordingly, after taking into account tax deductions, a fair figure for the loss of earnings during the medical leave of the plaintiff, inclusive of the period he was medically advised to do light work, should be in the sum of RM20,000.

The next item that was contested by learned counsel for Public Bank was the claim for general damages.

- C The case of *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19 was cited to support the contention that the plaintiff in the second action should not expect to get a sum for general damages which was more than that awarded in that case. For 65% first and second degree burns over parts of face, body, thighs and both upper limbs, the plaintiff in that case was awarded RM80,000 for general damages. That figure, although maintained by the Supreme Court, was described as 'a bit on the generous side'.

Accordingly, in the present case, having considered that the plaintiff suffered 36%–37% second and third degree burns, the fair sum for general damages, in my view, should be RM50,000. In doing so I have taken into account the depreciating value of money when taking the award in *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* as a guide.

- E I find no challenge to the other claims of the plaintiff from Public Bank and the Government, being a third party. In any event, I am satisfied that the plaintiff has proved his claim for the medical expenses by the production of the receipts (exhs P11A and 11B) which were not disputed by the opposing parties. As for the loss of clothing, shoes, watch and spectacles, I think I can take judicial notice that those items must have been with the plaintiff when he was injured in the accident. I do not think that strict proof should be imposed upon the plaintiff on such items or their values. After all the total claim on those items is only RM400.

- G To sum up, the damages to the plaintiff in this second action are as follows:

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|---|----------------|
| (a) General damages | : RM50,000; |
| (b) Special damages: | |
| (i) Loss of earnings | : RM20,000; |
| H (ii) Damage to clothing, shoes, watch and spectacles | : RM400; |
| (iii) Medical fees, hotel charges, taxi fares in Singapore, airfares and incidental | : RM124,152.10 |

- I I note that Public Bank had already paid the sum of RM36,973.25 for the medical expenses and other expenses for the plaintiff. I have not taken into account that payment in the summary of damages payable to the plaintiff and therefore that sum of RM36,973.25 should not be deducted from the summary of damages as given hereinabove.

It was mentioned by the plaintiff that he would require two more operations. Unfortunately, no indication was given as to how much those operations would cost him. As such I do not think it is proper for this court to speculate a figure. Thus, I decline to give any sum for those future operations.

As stated hereinabove, although I found Public Bank to be 10% liable in negligence, it would have to meet the payment of the full quantum of damages as awarded and costs. Of course it will be entitled to seek contribution from the Government which includes the director, since I have found Public Bank to have proved its claim against the Government and the director as third parties.

As for the interest, it shall be at the rate of 3% per annum on the special damages from the date of the accident to the date of trial and thereafter the statutory interest at the rate of 8% per annum on the judgment debt from the date of judgment to realization.

Finally, costs to the plaintiff as against Public Bank is to be taxed. And since the plaintiff has failed in his claim against the second defendant, costs is hereby awarded to the second defendant to be taxed. Perunding should also get its costs against Public Bank to be taxed as the latter failed in its claim against the former. Similarly, Public Bank should get costs against the Government and the director, to be taxed. I make the foregoing order on costs in the exercise of my discretion.

Claims allowed.

Reported by Ng Sheau Juan

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